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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT

(Placer)

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THE PEOPLE,

Plaintiff and Respondent,

v.

CECIL MARCEL ORTEGA,

Defendant and Appellant.

C087103

(Super. Ct. No. 62143932)

Appointed counsel for defendant Cecil Marcel Ortega has asked this court to review the record to determine whether there exist any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).) Based on our review of the record, we will modify the judgment to reflect 890 days of custody credit, strike the probation revocation fine, and impose, but suspend a mandatory parole revocation fine. Finding no other arguable error that would result in a disposition more favorable to defendant, we will affirm the judgment as modified.

**I**

We provide the following brief description of the facts and procedural history of the case. (See *People v. Kelly* (2006) 40 Cal.4th 106, 110, 124.)

A felony complaint filed by the People charged defendant with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); count one)<sup>1</sup> and alleged: that this offense was a serious felony within the meaning of section 1192.7, subdivision (c)(31), that in committing count one, defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)) causing the offense to be a violent felony within section 1192.7, subdivision (c)(8), and that count one was a violent felony within section 667.5, subdivision (c)(8). The People also charged defendant with battery with serious bodily injury (§ 243, subd. (d); count two), assault by means of force likely to cause great bodily injury (§ 245, subd. (a)(4); count three), criminal threats (§ 422; count four), dissuading a witness by force or threat (§ 136.1, subd. (c)(1); count five), and false imprisonment by violence (§ 236; count six).

After two section 1368 evaluations, defendant was found mentally incompetent to stand trial. He was committed to a state mental hospital, which was authorized to involuntarily medicate him. Defendant was treated and certified competent to stand trial. Upon his return to his home court, the parties stipulated to the reinstatement of the charges against him. Thereafter, another section 1368 evaluation was conducted, and defendant was again found competent to stand trial.

Prior to trial, defendant pleaded no contest to count one (§ 245, subd. (a)(1)) and admitted the great bodily injury special allegation (§ 12022.7, subd. (a)) in exchange for the dismissal of the remaining counts and a stipulated sentence of three years for the assault and a consecutive three years on the enhancement for a total of six years in state prison. The stipulated factual basis for the plea was: “[T]he defendant got into a verbal altercation with his mother, victim [J.B.]. The altercation turned physical, at which time the defendant, using a knife, cut his mother’s face, causing a three-inch laceration on her

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

face that was one centimeter thick.” The trial court confirmed defendant’s understanding of the implications of the plea agreement, that it was conditional on the court imposing the agreed upon sentence, and that defendant would not be able to withdraw from that agreement if he changed his mind. The court then accepted defendant’s no contest plea and admission, finding his waiver was knowing, voluntary, and intelligent.

Prior to sentencing, defendant moved to withdraw his plea because he had changed his mind and wanted to have a jury trial, which the trial court denied. Thereafter, in accordance with the plea agreement, the trial court sentenced defendant to three years for the assault and a consecutive three years for the enhancement for a total of six years. The court also imposed a \$300 restitution fine (§ 1202.4), a \$300 probation revocation fine (§ 1202.44), a \$40 court operations assessment (§ 1465.8), and a \$30 criminal conviction assessment (Gov. Code, § 70373), but waived imposition of the booking and incarceration fees, finding defendant would be unable to pay them. The issue of victim restitution was reserved. Finally, the court awarded defendant 682 days’ credit for time in jail, plus 104 days of conduct credit, and 104 days for time in the state hospital for a total of “888” days of custody credit. Defendant timely appealed and received a certificate of probable cause.

## II

Counsel filed an opening brief that sets forth the facts of the case and requests that we review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief, but to date has not done so. Our review of the record has disclosed two trial court sentencing errors, which are correctable on appeal.

First, the sum total number of the custody credits awarded defendant is 890, not 888, days. (See *People v. Guillen* (1994) 25 Cal.App.4th 756, 764 [correcting mathematical error in custody credits].) Second, the trial court erred in imposing a

probation revocation restitution fine (§ 1202.44) instead of a parole revocation restitution fine (§ 1202.45), as defendant was not granted probation, but was instead sentenced to prison including the possibility of parole or postrelease community supervision. Under the circumstances, section 1202.45 mandated the trial court impose, but suspend, a parole revocation fine in an amount equal to the restitution fine imposed as part of defendant's sentence. (*Ibid.*; see *People v. Smith* (2001) 24 Cal.4th 849, 853-854 [errors concerning parole revocation fine correctable on appeal without the need to remand for further proceedings].) Finding no other arguable error that would result in a disposition more favorable to defendant, we will affirm the judgment as modified.

### **DISPOSITION**

We modify the judgment to reflect 890 days of custody credit. We also strike the probation revocation fine imposed (§ 1202.44) and impose, but suspend until parole is revoked, the parole revocation restitution fine (§ 1202.45) in an amount of \$300. Because the abstract of judgment already accurately reflects both the total custody credits, as well as the imposition and suspension of a parole revocation fine, no amendment of that document is necessary. The judgment is affirmed as modified.

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RAYE, P. J.

We concur:

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ROBIE, J.

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DUARTE, J.